83-807

No. .....

IN THE

Supreme Court of the United States

October Term 1983

Carl Michael Siebert,

Petitioner

vs.

D.T. Baptist, District Director
of Internal Revenue Service, et al.,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

J. Stephen Salter
Groenendyke and Salter
2205 Morris Avenue
Birmingham, Alabama 35203
Telephone (205) 251-6666
Attorney for Petitioner

Copy Cat Printing Co. 3805 Governors Dr., Huntsville, AL 35805 Phone (205) 536-5133

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.:
v.	)	CV77-PT-0951-NE
	)	
D.T. BAPTIST, District Director of Internal Revenue, et al.,	)	
	)	
Defendants.	)	

ORDER

The Motion for Summary Judgment filed by defendant Frank McCammon is GRANTED. Plaintiff's complaint against said defendant is DISMISSED, with prejudice; with costs to plaintiff. The court reserves judgment on all other pending motions.

DONE and ORDERED this 3rd day of December, 1981.

(s) ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE
ROBERT B. PROPST

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.:
v.	)	CV77-PT-0951-NE
	)	
D.T. BAPTIST, District Director of Internal Revenue, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

For the first time this court has had an opportunity to begin a full review of the evidence before this court on Motion for Summary Judgment. This review is continuing, but the court has already made a determination as to defendant Frank McCammon.

Basically, as to defendant McCammon, plaintiff charges that he was rude to plaintiff and that he refused to consider matters presented by plaintiff concerning Steve Beshears.

The court notes that this episode involving defendant McCammon took place not earlier than 1973 and possibly as late as 1974. There is no indication that McCammon had anything to do with the termination of plaintiff's taxable year or any assessment or seizure made thereafter. Apparently, plaintiff desired that McCammon investigate the tax liability of Beshears. He was offended by McCammon's refusal to investigate Beshears and his rudeness directed toward plaintiff. None of the alleged conduct of McCammon, if true, would arise to the level of violating any constitutional right of plaintiff; particularly under the Fifth Amendment.

The Motion for Summary Judgment of defendant Frank McCammon will be granted.

An order consistent with this memorandum opinion will be contemporaneously entered.

This the 3rd day of December, 1981.

(s) ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE
ROBERT B. PROPST

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.:
v.	)	CV-77-PT-0951-NE
	)	
D.T. BAPTIST, et al.,	)	
	)	
Defendants.	)	

ORDER

On August 21, 1981, the individual federal defendants in the above styled action filed with this court a Motion for Summary Judgment pursuant to Rule 56, Federal Rules of Civil Procedure. As grounds for and in support of said Motion, the defendants listed, *inter alia*, that defendants were absolutely immune from suit for damages in claims such as those involved in the case at bar. On September 15, 1981, defendants filed a Memorandum in Support of Defendants' Motion for Summary Judgment. Among the questions presented in the defendants' Memorandum was:

> "2. Whether the defendants acted in good faith, without malice, and in the belief that their actions were in full compliance with their statutory duty and the Constitution, and are therefore protected from this suit for damages under the doctrine of qualified official immunity." (emphasis added).

Since the filing of the last Motion raising the ground of qualified official immunity, dated September 15, 1980, and this court's order entered October 20, 1980, overruling such Motion, there has been significant discovery in this case by way of depositions taken upon oral examination. The consideration of a Motion for Summary Judgment requires the review and careful consideration of any undisputed facts before the court by way of affidavit, deposition or other discovery form.

In light of the foregoing, this court will reconsider the question presented in defendants' Memorandum of September 15, 1981, concerning qualified immunity. However, the court wishes to avoid any question as to notice

to plaintiff as to the grounds for said motion.

The Court hereby DIRECTS that the parties shall, within fifteen (15) days after the entry of this order, extract for and present to the court any undisputed factual data in depositions of affidavits upon which they may rely in support of or in opposition to the defense of qualified official immunity.

DONE and ORDERED this 3rd day of December, 1981.

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT, Plaintiff,	)	
v.	)	CIVIL ACTION NO.: CV77-PT-0951-NE
D.T. BAPTIST, District Director of Internal Revenue, et al., Defendants.	)	

ORDER

In accordance with a Memorandum Opinion contemporaneously entered the court hereby grants the Motions for Summary Judgment of defendants Baptist and Magill and partially grants the Motion for Summary Judgment of defendant Willingham.

All claims of plaintiff against defendants Baptist and Magill are DISMISSED with prejudice.

All claims of plaintiff against defendant Willingham except those relating to the

disposition, after seizure, of the guitar and currency collection, are DISMISSED with prejudice.

The following motions are OVERRULED:

1. Plaintiff's Motion for Rehearing filed August 21, 1981;

2. Plaintiff's Motion to Suspend Time for Response to Pre-Trial Order filed August 26, 1981;

3. Motion to Enlarge, Stay the Order, and/or Grant Interlocutory Appeal filed by plaintiff on September 9, 1981; and

4. Plaintiff's Motion to Compel filed September 18, 1981.

The following motion is GRANTED: Defendants' Motion for Protective Order filed November 19, 1981.

DONE and ORDERED this 8th day of January, 1982.

(s) ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE
ROBERT B. PROPST

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.:
v.	)	CV77-PT-0951-NE
	)	
D.T. BAPTIST, District Director of Internal Revenue, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This case comes on to be heard on various motions, all now under submission, as hereinafter discussed.[1]

This case was reassigned to this judge after its reversal by the Fifth Circuit Court of Appeals. See *Seibert v. Baptist*, 599 F.2d 743 (5th Cir. 1979). The case against these defendants had been dismissed, on a motion to

---

[1] The motions have been filed by plaintiff and defendants Baptist, Willingham, Magill and McCammon. Defendant Beshears has never been served.

dismiss, by Judge Pointer of this court. The jurisdictional issues concerning the case and an overview of the jurisdictional allegations are discussed in a Memorandum Opinion entered by Judge Pointer of this court which was originally adopted by the Fifth Circuit Court of Appeals in a decision reported as *Seibert v. Baptist*, 594 F.2d 423 (5th Cir. 1979).

In Judge Pointer's opinion, he ultimately held that plaintiff had no cause of action under 28 U.S.C. §§ 2201-02, 42 U.S.C. § 1983, or 42 U.S.C. § 1985. He further held that there was no jurisdiction under 42 U.S.C. § 1331 for constitutional violations under the Fourth and Fifth Amendments to the United States Constitution. As to the Fourth Amendment claim, Judge Pointer stated: "Similarly, while in *Bivens* infringement of the plaintiff's fourth amendment rights was clear and direct, in the present case, it appears that appropriate

notice of termination and notice of seizure were given to the plaintiff at the time his property was taken. This being the case, the seizure was not so unreasonable as that involved in *Bivens*." 594 F.2d at 431. Judge Pointer thus concluded that plaintiff had no cause of action under the Fourth Amendment.

As to the Fifth Amendment claim, Judge Pointer relied upon the Fifth Circuit decision in *Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978), and held that there was no implied cause of action under the Fifth Amendment.

The Fifth Circuit initially affirmed Judge Pointer's decision. Subsequently, *Davis v. Passman, supra*, was reversed by the United States Supreme Court, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), and in *Seibert v. Baptist*, 599 F.2d 743 (5th Cir. 1979), the court reversed and remanded this case on the basis that the United States Supreme

Court had found that a cause of action as well as a damages remedy could be implied under the due process clause of the Fifth Amendment. In a motion filed June 22, 1981, plaintiff has acknowledged that, "Then on Petition for Rehearing filed on May 22, 1979, the court below reversed only the Fifth Amendment jurisdiction on the basis of *Davis v. Passman*, 99 S.Ct. 2264, 60 L.Ed.2d 1979."

After the case was reassigned to this court, the court has, on several occasions, attempted to set the case for trial. This effort has been interrupted by an initial indication of unreadiness for trial and several motions, including a motion for continuance filed by the plaintiff and a withdrawal of plaintiff's attorney.

Presently before the court for consideration are:

1. Plaintiff's Motion for Rehearing

filed August 21, 1981;

2. Defendants' Motion for Summary Judgment filed August 21, 1981;

3. Plaintiff's Motion to Suspend Time for Response to Pre-Trial Order filed August 26, 1981;

4. Motion to Enlarge, Stay the Order, and/or Grant Interlocutory Appeal filed by plaintiff on September 9, 1981;

5. Plaintiff's Motion to Compel filed September 19, 1981. This motion was previously set for hearing, but the parties agreed that it was unnecessary to hold the hearing; and,

6. Defendants' Motion for Protective Order filed November 19, 1981.

The claims which are presumably before the court are those grounded on violations of the Fourth and Fifth Amendment, the court having jurisdiction thereof under 28 U.S.C. § 1331, and claims under 42 U.S.C. §§ 1983,

1985, and 1986.[2]

Defendants' Motion for Summary Judgment filed August 21, 1981 is premised on four arguments:

1. That the cause is barred by a one year statute of limitations;

2. That defendants are absolutely immune from liability under *Stankewitz v. Internal Revenue Service*, No. 79-4214 (9th Cir. Jan. 12, 1981); *Dedman v. Vowell*, No. J-C-80-103 (E.D. Ark. Jan. 18, 1981);

3. That as to Defendant Willingham, plaintiff states only a claim under the Fourth

---

[2]There is an obvious question as to whether the claims, other than the Fifth Amendment claim, are still before the court. However, in the instance, the claims are so closely related, the court feels it best to consider the claims under all theories for the purposes of the pending Motion for Summary Judgment. Plaintiff now claims (by amendment filed after the Fifth Circuit cases) that defendants conspired with state employees.

Amendment which has been proscribed by Judge Pointer's decision and the Fifth Circuit's affirmance with regard to Fourth Amendment claims; and,

4. That as to Defendant McCammon plaintiff makes only a claim of a refusal to investigate the tax liability of Stephen Beshears. The court has previously held that neither this claim, nor the claim of plaintiff that McCammon was rude to him, support any federal claim, and has dismissed the claim(s) against McCammon.[3]

The court noticed that, although defendants had not listed claimed "qualified immunity" as a ground for their Motion for Summary Judgment filed on August 21, 1981, they had argued for it in briefs filed with the court.

---

[3]The court also notes that this claim was clearly barred by the statute of limitations.

To avoid any question of notice, the court has advised the parties that the defense of qualified immunity would be considered on the Motion for Summary Judgment of defendants.

Although Judge Pointer treated defendants' Motion to Dismiss as a Motion for Summary Judgment under Rule 56, he only gave consideration to the jurisdictional allegations and did not consider the qualified immunity or statute of limitations defenses. He mentioned the absolute immunity defense in passing, but did not relate it to any facts or discuss it fully.

On October 22, 1980, this court entered on order denying defendants' Motion for Summary Judgment filed September 15, 1980. The court held at that time that there was no absolute immunity and that there had not been sufficient time for discovery (since the case was reassigned to this court) with regard to the qualified immunity defense. Since this court's

ruling on that motion, the case of *Stankewitz v. Internal Revenue Service*, 640 F.2d 205 (9th Cir. 1981) has been decided. Further, the plaintiff has now completed considerable discovery. Thus, the court is of the opinion that it is appropriate to consider the refiled Motion for Summary Judgment.

In hearing this Motion for Summary Judgment, this court has considered the following:

1. Deposition of Randall Duck filed 12/17/80;

2. Deposition of Phillip Weir filed 12/17/80;

3. Deposition of Harold E. Grierson filed 12/22/80;

4. Deposition of Donald W. Houton filed 12/22/80;

5. Deposition of Frank W. Magill filed 12/22/80;

6. Deposition of Columbus Sanders filed 12/22/80;

7. Deposition of Frank A. McCammon filed 12/29/80;

8. Deposition of Meridith Lee Willingham filed 12/31/80;

9. Deposition of D.T. Baptist filed January 5, 1981;

10. Deposition of Larry R. Hyatt filed January 8, 1981;

11. Deposition of Sam Acquisto filed 1/12/81;

12. Deposition of Carl Michael Seibert filed 4/20/81;

13. Motion for Rehearing filed by plaintiff on 8/14/81;

14. Affidavit of Carl Michael Seibert filed 10/6/80;

15. Affidavit of Mary C. Seibert dated 9/30/80 (attached to affidavit of Carl Michael

Seibert filed 10/6/80);

16. Motion in Opposition, etc. filed by plaintiff on June 22, 1981;

17. Various documents filed in support of and in opposition to the Motion for Summary Judgment as attachments and otherwise.

The defendants (who have been served) who remain in the case are D.T. Baptist, Frank W. Magill, Jr., and Lee Willingham.

The claims against these defendants are as follows:

1. D.T. Baptist:

a. He conspired with other defendants and state officials to deprive plaintiff of his civil rights;

b. That he was District Director of Internal Revenue Service when plaintiff's tax year was terminated and generally employed and directed the joint effort between the office and powers of I.R.S. and local police to

harass the plaintiff, an alleged drug offender, without cause, reason or justification. Said defendant rejected plaintiff's 1040's for 1972 and 1973, raising the tax to $8,257.73 and assessing $368.70 in penalties. Said defendant, together with others, refused plaintiff's repeated written requests for interviews or explanations, and withheld from plaintiff information in his file. He issued the deficiency notice approximately two years after Notice of Termination.

2. Frank Magill, Jr.:

a. He conspired with other defendants and state officials to deprive plaintiff of his civil rights;

b. That he terminated plaintiff's taxable year on July 10, 1972 without probable cause.

3. Lee Willingham:

a. He conspired with other defendants

and state officials to deprive plaintiff of his civil rights;

b. That he levied on all property seized in the drug arrest by the Huntsville Police Department, seized plaintiff's father's automobile, plaintiff;s guitar, plaintiff's currency collection, and his bank account. He seized said property before giving notice of termination, wrongfully converted plaintiff's guitar and currency collection, failed to give information about the assessment or its amount, and failed to examine evidence exculpating plaintiff of the I.R.S. charges of criminal activity and income therefrom.

FACTS

Considered most favorably to plaintiff, the facts are as follows:

On about July 4th or 5th, 1972, Stephen Beshears, an acquaintance of plaintiff, came to plaintiff's residence in Huntsville,

Alabama and asked him to go meet Beshears' cousin from Mobile. Plaintiff says that on the way to Cotton Club to meet the cousin, Beshears informed plaintiff that he had some drugs, likely LSD, and asked plaintiff to hand his "cousin" some envelopes. Plaintiff refused and accused Beshears of attempting to "(s)et me up." This led to a belligerent argument before plaintiff returned to his home.

On July 7, 1972, Beshears returned to plaintiff's residence at about 5:30 p.m., again asking plaintiff to go meet his cousin so he could convince plaintiff he was okay. Plaintiff refused to go. Upon leaving, Beshears asked plaintiff for an envelope and plaintiff gave him a "(l)ight blue one."

Later that same evening, Plaintiff put his Martin D35 guitar and an overnight bag containing $460.00 in cash in the trunk of his vehicle and headed for Athens College in

Athens, Alabama. At about 6:30 p.m., two Huntsville policemen pulled his car over just down the street from plaintiff's residence. The policemen, with guns drawn, got out of an unmarked car. One of the policemen identified himself, required plaintiff to put his hands on the top of his car and removed items from plaintiff's person. The policemen did not have a search warrant for the automobile. Plaintiff was placed under arrest. One of the officers pulled two envelopes from the car and held them up for viewing by television cameras which were already on the scene. Plaintiff denies having previously seen the envelopes. One of the envelopes was apparently the one plaintiff had given Beshears earlier in the day. The envelopes contained LSD.

The police officers then opened the trunk of the vehicle, again without a search warrant, and searched it. At this time there were

numerous policemen and representatives of the news media present.

Plaintiff was returned in handcuffs to his residence. Claiming to have a search warrant for the residence,[4] the policemen searched the residence, including plaintiff's room, and found a small amount of marijuana, which plaintiff acknowledges as his, and $2,000.00 in cash. Five to six hundred dollars was ordinary cash, twelve bills were 1935 uncirculated silver certificates, and the rest was in old bills which plaintiff had saved. The policemen also found pieces of paper with ninety doses of LSD and a small amount of hasish someone had given to plaintiff.

The plaintiff and a number of policemen and newspaper reporters stayed at the residence

---

[4]The residence was that of plaintiff's parents, but he had a room there.

for about two and half hours. Plaintiff's parents were not initially present, but returned at about 7:15 p.m. They were informed that plaintiff was under arrest for possession of LSD.

Shortly before plaintiff was taken to the police station one of the police officers made a phone call and told plaintiff's parents, "They'll be here in about fifteen minutes."[5] Two IRS agents, who have not been identified, came to plaintiff's residence at about 8:00 p.m., after plaintiff had left, and directed the police officers in the seizure of the currency.

Later, while plaintiff was in jail, he was served a written notice of seizure. The notice was signed by defendant Magill and

---

[5]Plaintiff's mother says in her affidavit that officer Randall Duck told her that IRS agents "(s)hould be coming over from the Clinton Building (or Clinton Street) in about 15 minutes."

served by defendant Willingham. The automobile,[6] guitar,[7] the currency and a bank were levied upon.

Plaintiff was subsequently indicted for possession of LSD. He was originally convicted, but his case was reversed on appeal.[8] Plaintiff originally named the arresting police officers, Duck and Patterson, along with state trial judge, as defendants in this action. On September 29, 1977, plaintiff moved to dismiss defendants Duck and Patterson. These defendants were dismissed with prejudice on October 4, 1977. These defendants were

---

[6] Later determined to be owned by his father.

[7] Later returned by IRS to Veronica Potter.

[8] *Seibert* v. *State*, 292 Ala. 748, 298 So.2d 652 (1974); *Seibert* v. *State*, 343 So.2d 796 (1976); *Seibert* v. *State*, 343 So.2d 788 (1977); *Seibert* v. *State*, 53 Ala. App. 229, 298 So.2d 649 (1974); *Seibert* v. *State*, 343 So.2d 780 (Ala. Cr. App. 1975); *Seibert* v. *State*, 343 So.2d 785 (Ala. Cr. App. 1976); *Seibert* v. *State*, 343 So.2d 787 (Ala. Cr. App. 1977).

dismissed under an agreement not to continue the criminal prosecution against plaintiff. The state trial judge was dismissed by Judge Pointer of the basis of judicial immunity on November 9, 1977.

The court assumes, for the purpose of the pending motions, that plaintiff was innocent of all crimes for which he was indicted. The court further assumes that plaintiff could perhaps prove, at a trial, that the police and Beshears "set plaintiff up" as plaintiff claims.

In addition to complaining of the actions of the unidentified agents who came to his residence on July 7, plaintiff complains of the various actions of IRS in terminating his tax year and its subsequent collection actions. On July 10, 1972, Larry R. Hyatt, a Group Manager or Group Supervisor of the Intelligence Division, recommended that plaintiff's 1972 tax year be terminated effective July 7,

1972. Hyatt's letter recommendation accompanied a Form 2644, the form used by IRS for recommendations of jeopardy and termination assessments. The Form 2644 was routed through and approved by the chiefs of the Birmingham Audit Division, Intelligence Division, and Collection Division. It was approved by defendant Magill as Acting Director.[9]

The letter from Hyatt stated that the Huntsville Police Department executed a search warrant and found 90 LSD blotters in his bedroom and 1,000 LSD blotters in his automobile. The letter from Hyatt calculated that plaintiff had been clearing $960.00 per week selling LSD blotters. Based on these calculations his 1972 tax due was calculated to be

---

[9]Neither Agent Tom McWhorter, who made the original request for the termination assessment, nor the Division Chiefs who approved the request, are defendants in this cause.

$6,458.00.[10] This calculation was based on sketchy estimations from an alleged informer and the Huntsville Police Department and was incorporated into the Form 2644 recommendation. Defendant Magill relied on the information presented to him and on July 10, 1972 approved the termination recommendation and directed the Collection Division "(t)o make the necessary assessments immediately and take such steps for collection as are provided by law."

Pursuant to defendant Magill's approval, plaintiff was served with "Notice of Termination of Taxable Period" dated July 10, 1972. This notice, signed by Magill, declared income tax in the amount of $6,458.00 immediately due and payable and demand for payment was made. Plaintiff was not served with a notice of

---

[10] The assessment was presumably calculated by an unidentified revenue agent. This agent is not a defendant. There is no evidence that any defendant in this cause made the calculation.

deficiency within 60 days after the making of the termination assessment. He was served with a notice of seizure. There is no evidence that defendant Magill knew plaintiff or that he bore any malice toward him. He relied on the documents before him and the recommendations of the Division Chiefs.[11]

On August 7, 1974 a statutory notice of deficiency was issued to plaintiff. Plaintiff petitioned the Tax Court for a redetermination of the amount of deficiency. On January 17, 1977, the Tax Court entered an order that plaintiff was entitled to a full refund of the 1972 assessment. This came as a result of an agreement between plaintiff and IRS.

---

[11] For a discussion of the procedures followed by IRS and the statutory basis therefor, see *Seibert v. Baptist*, 594 F.2d 423 (5th Cir. 1979). For a further review of the tax procedures of the type involved in this case, see *Carlson V. United States*, 580 F.2d 1365, 1368 (10th Cir. 1978).

Although plaintiff has complained of various wrongs committed by IRS, the Huntsville police, and Steven Beshears, with various references to what "they" did, it is the duty of the court to examine the evidence which is before the court against the named defendants.

FRANK W. MAGILL

Magill was the Assistant Director of the Birmingham District of IRS from 1959 until 1973. Magill served as Acting Director in the absence of the Director. In his capacity as Acting Director, Majill approved the 2644 Form approving the termination of plaintiff's tax year. This was based on the letter from Hyatt and the prior approval of three Division Chiefs. There is no evidence that Magill knew the plaintiff, bore any malice toward him, or was acting other than routinely in approving the termination. There is absolutely no evidence that

Magill conspired with other defendants or state officials as charged by plaintiff.

LEE WILLINGHAM

In July 1972, Willingham was a revenue officer in the Collection Division of the Birmingham District of IRS. He was stationed in Huntsville. After plaintiff's tax year was terminated, Willingham went to the jail where plaintiff was in custody and served the "Notice of Termination of Taxable Period" on plaintiff. He later seized plaintiff's currency, the automobile plaintiff was driving when arrested, and the guitar. He converted the currency into a cashier's check. He later released the guitar to Veronica Potter after she had shown him proof of ownership. He did not notify plaintiff of his intention to deliver the guitar to Potter; nor did he discuss Potter's "proof" with plaintiff. Willingham was not

involved in the decision to terminate plaintiff's tax year. There is absolutely no evidence that Willingham conspired with other defendants or state officials.

D.T. BAPTIST

In July 1972, Baptist was the Director of the Birmingham District of Internal Revenue. At the time the Form 2644 requesting termination was received at his office, he was absent. He neither reviewed nor approved the requested termination. There is no evidence that he directed "(t)he joint effort between the office and powers of IRS and local police to harass plaintiff . . ." There is no evidence that Baptist was personally involved in the issuance of the deficiency notice. There is no evidence that he conspired with other defendants or state officials. There is no evidence that Baptist personally initiated any

action against plaintiff, and the most that can be said is that he reasonably relied upon the recommendations of his subordinates. Some of the actions purportedly authorized by Baptist were actually taken by subordinates who used Baptist's signature by virtue of delegated authority.

CONCLUSIONS OF LAW

A review of this case must be made in light of the fact that the I.R.S. is duty bound to inquire after persons who may be liable for the payment of taxes. *Donaldson v. United States*, 400 U.S. 517, 523 (1971). Of course, this inquiry and any subsequent action must be made with due consideration for the interests protected by provisions of the United States Constitution. See *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Further, inasmuch as this cause is before the

court in part upon a Motion for Summary Judgment by defendants, the court will view the record in the light most favorable to the party opposing the motion and will, therefore, draw all inferences most favorable to the plaintiff, Carl Michael Seibert. See e.g., *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); and *Walters v. City of Ocean Springs*, 626 F.2d 1317 (5th Cir. 1980).

As noted above, although the defendants had not listed the defense of qualified immunity as a ground for their Motion for Summary Judgment, they had addressed the defense in briefs filed with the court. To avoid any question of notice as to this defense, the court advised the parties that the defense of qualified immunity would be considered on the Motion for Summary Summary Judgment. The Supreme Court of the United States and the Court of Appeals, Fifth Circuit, have

consistently held that the qualified immunity defense is proper for consideration on a Motion for Summary Judgment. See *Butz v. Economou*, 438 U.S. 478 (1978); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Barker v. Norman*, 651 F.2d 1107 (5th Cir. 1981); and *Gordon v. Watson*, 622 F.2d 120 (5th Cir. 1980).

WERE PLAINTIFF'S RIGHTS VIOLATED?

In the recent opinion by the Fifth Circuit Court of Appeals in the case of *Barker v. Norman*, *supra*, the court explained that while a defendant is permitted to proceed directly to the question of qualified immunity, as it is a complete defense to liability, there are two threshold issues that should be separated from the qualified immunity issue. These threshold issues are:

1. Is there a genuine issue of fact as to the objective conduct of the defendant? and,

2. Did the complained of conduct, if it in fact occurred, violate any rights of the plaintiff?[12]

The court will not address the first of these threshold issues as the facts of this action have been discussed above in depth. However, the court feels compelled to briefly address the second threshold issue inasmuch as the plaintiff in this cause has complained of alleged violations of his constitutional rights as guaranteed under the Fifth Amendment. As the court stated in *Barker, supra*, "if the complained of conduct would not as a legal matter, amount to a violation of rights secured to the plaintiff under the Constitution of the United States, then summary judgment is proper." (footnotes omitted.) 651 F.2d 1107 at 1124.

---

[12] See 651 F.2d 1107, at 1123, 1124.

As earlier noted, this court has carefully considered all factual data submitted to the court with regard to this action by all parties. In light of the court's review of the submitted materials, the court can only conclude that serious doubt exists as to whether or not the complained of actions allegedly committed by defendants Baptist and Magill were such as to rise to the level of constitutional violations. *Bivens v. Six Unknown Federal Narcotics Agents, supra,* held that a "cause of action for damages" arises under the United States Constitution when Fourth Amendment rights are violated. The case of *Davis v. Passman,* 442 U.S. 228 (1979), held that a cause of action and damages remedy could be implied under the due process clause of the Fifth Amendment. It is a *Davis* type "cause of action" which the plaintiff in the case at bar has brought before this court. However, not

all alleged violations of the Fifth Amendment will support a cause of action. As earlier noted, Judge Pointer pointed out in his in-depth Memorandum Opinion in this case dated August 11, 1980:

> "(W)hile in *Bivens* infringement of the plaintiff's fourth amendment rights was clear and direct, in the present case, it appears that appropriate notice of termination and notice of seizure were given to the plaintiff at the time his property was taken. This being the case, the seizure was not so unreasonable as that involved in *Bivens*.

See 594 F.2d 423, at 431. With regard to the alleged Fifth Amendment violations asserted by the plaintiff in the instant action, no "clear and direct" infringement of rights has been shown by the plaintiff. Thus, assuming the facts as given and addressed earlier in this opinion to be accurate, at least some question remains as to whether or not the participation in the complained of events by

defendants Baptist, Magill and Willingham was such as to rise to the level of constitutional violations. Even recognizing that violations of the due process clause of the Fifth Amendment may form the basis of a legal claim upon which relief may be granted, adequate provision for the safeguarding of due process and equal protection rights have been made a part of the Internal Revenue Service legislative framework by Congress pursuant to its power "to lay and collect taxes." It appears from the given facts in this action that the mandated due process safeguards were compiled with except for certain exceptions that will be discussed below.

QUALIFIED OFFICIAL IMMUNITY

The Fifth Circuit Court of Appeals held in *Barker v. Norman, supra*, that the complete affirmative defense of qualified immunity was

a third distinct issue to be dealt with. The court will now consider this issue in light of the materials before it.

In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the Supreme Court extinguished the hopes of federal executive officials that they were protected by the defense of absolute immunity and held that only:

> "(A) qualified immunity is available to officers of the executive branch of Government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based."

See 416 U.S. 232 at 247.[13] This qualified

---

[13] While *Schuer* (sic) dealt with the immunity of state officials, the official immunity doctrine in suits against federal officials for violations of constitutional rights has been held identical to the immunity doctrine applied in Section 1983 actions. See *Butz v. Economou*, 438 U.S. 478 (1978); *Mark v. Groff*, 521 F.2d 1376 (9th Cir. 1975); *Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974).

immunity defense is composed of two parts: an objective part requiring reasonable grounds for the defendant's belief in the legality of the alleged unconstitutional conduct, and a subjective part requiring good faith. See *Wood v. Strickland*, 420 U.S. 308 (1975); *Schuer* (sic) *v. Rhodes*, *supra*; *Pierson v. Ray*, 386 U.S. 547 (1967); *Boscarino v. Nelson*, 518 F.2d 879 (7th Cir. 1975); and *Barker v. Norman*, *supra*. This defense of qualified immunity is available to federal officers in actions against them for alleged violations of constitutional rights. See *Butz v. Economou*, 438 U.S. 478 (1978); and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339 (2nd Cir. 1972). Several courts have applied the defense to Internal Revenue Service officials where recovery was sought based upon constitutional wrongs. See *Mark v. Groff*, 521 F.2d 1376 (9th Cir. 1975);

Jetson Mfg. Co. v. Murphy, 462 F.Supp. 807 (M.D. Penn. 1978); *Terrapin Leasing Ltd. v. United States*, 449 F.Supp. 7 (W.D. Okla. 1978); *White v. Boyle*, 390 F.Supp. 514 (W.D. Va.), *aff'd.*, 538 F.2d 1077 (4th Cir. 1975). Thus, the remaining inquiry is whether the Internal Revenue officials in the instant action are protected from damages liability by qualified immunity.

To be entitled to claim official immunity, the defendant has the burden of establishing objective circumstances showing that he acted as a public official and within the scope of his discretionary authority. To meet this burden, the defendant must provide more than a bold assertion that the complained of actions were undertaken pursuant to the performance of his duties and within the scope of his discretion. "There must be a showing by competent summary judgment materials of objective

circumstances that would compel that conclusion." See *Barker*, *supra*, 651 F.2d 1107, at 1125. In *Barker*, the Fifth Circuit explained that: "(s)uch objective circumstances necessarily must encompass the factual context within which the complained of conduct took place." 651 F.2d at 1125. Further, the court stated:

> (A)lso appropriate is a showing by the defendant of facts relating to the scope of his official duites -- e.g., a showing of the circumstances through which he initially came to believe that his lawful authority included within its scope actions of the type that are complained of by the plaintiff.

651 F.2d at 1125.

This court is of the opinion that defendants Baptist and Magill[14] have submitted competent objective materials sufficient to support summary judgment in their favor.

---

[14] Defendant Willingham will be discussed below.

Defendant Baptist has shown, as stated earlier, that at the times pertinent to this action, he was the Director of the Birmingham District of Internal Revenue. At the time the termination request was received at his office, he was absent. He neither reviewed nor approved the requested termination. Plaintiff has offered no evidence that Baptist directed "(t)he joint effort between the office and powers of IRS and local police to harass plaintiff . . ." There is no evidence that Baptist was personally involved in the issuance of the deficiency notice. There is no evidence that he conspired with other defendants or state officials. There is no evidence that he personally initiated any action against the plaintiff, and the most that can be said is that he reasonably relied upon the recommendations of his subordinates. In fact, some of the actions purportedly authorized by Baptist were actually

taken by subordinates who used Baptist's signature by virtue of delegated authority. Defendant Magill was the Assistant Director of the Birmingham District of Internal Revenue Service from 1959 to 1973 and served as Acting Director in the absence of the Director. In his capacity as Acting Director, he approved the 2644 Form approving the termination of plaintiff's tax year. Plaintiff has offered no evidence that defendant Magill knew the plaintiff, bore any malice toward him, or was acting other than routinely in approving the termination. There is no evidence that Magill conspired with other defendants or state officials as charged by plaintiff. From its review of the record, this court has determined that competent materials have been submitted to show that defendants Baptist and Magill were at all times acting pursuant to federal law and authority, were acting within

the scope of their official duties, performed their acts in good faith and with the reasonable belief that their actions were legal, proper and necessary. Statements made by the parties in affidavits and depositions support a conclusion that all actions by both Baptist and Magill were carried out pursuant to the performance of their official duties and within the scope of their discretionary authority.

Once the defendants have established sufficient objective circumstances evidencing that their actions were taken as public officials and within the scope of their discretionary authority, the ball then rebounds into the plaintiff's court. In *Barker*, the court stated:

> Once the defendant has established that he is entitled to claim official immunity, under *Douthit* the burden shifts to the plaintiff to establish that the immunity should be breached because either the defendant harbored a subjective malicious intent or he knew or should have known that his actions violated a clearly

> established constitutional right of the plaintiff . . . (H)e must establish that there is a genuine issue of material fact as to whether the defendant lacked "good faith" -- i.e., whether the defendant knew or reasonably should have known that he was violating the constitutional rights of the plaintiff, or the defendant maliciously intended to harm the plaintiff.

651 F.2d 1107, 1125 and 1126.

Further that:

> The first component requires the plaintiff to raise, through competent summary judgment materials, a genuine issue of fact as to what the settled law was at the time of the defendant's conduct, and whether the defendant knew or should have known that his conduct was not in conformity with that settled law . . .
>
> As to this second component of the "good faith" issue, it is the plaintiff's burden to raise a triable issue of fact as to the defendant's malicious intent once the defendant has established that he is entitled to claim official immunity because the complained-of conduct was undertaken pursuant to his discretionary authority. As a practical matter, the plaintiff may meet his burden of raising a triable

> issue of fact as to defendant's malicious intent in either of two ways: he may introduce competent summary judgment materials, or point to summary judgment materials already in the record, that would tend to prove directly that the defendant acted with subjective malice; or, he may introduce competent summary judgment materials, or point to summary judgment materials already in the record, that would tend circumstantially to prove that the defendant acted with malicious intent. (emphasis in original) (footnotes omitted).

651 F.2d 1107, 1126.

In meeting this burden, the plaintiff in this cause has offered no evidence to show that defendants Baptist and Magill acted with subjective malice or with malicious intent or that they knew or reasonably should have known that they were violating the constitutional rights of plaintiff.[15] As noted in defendants' Brief in Support of Motion for Summary Judgment,

---

[15] Cf. *Weisbrod v. Donigan*, 651 F.2d 334 (5th Cir. 1981).

any attempted reliance by the plaintiff on *Laing v. United States*, 423 U.S. 161 (1976) to support his notice of deficiency argument is misplaced as *Laing* was not decided by the Supreme Court until years after the termination of the plaintiff's taxable year. *Laing* was also decided after the notice of deficiency was issued to the plaintiff. Prior to the *Laing* decision, the Internal Revenue Service had long maintained that a deficiency notice was not required in Section 6851 terminations. In fact, cases interpreting Section 6851 were in conflict with the Second and Seventh Circuits (*Irving v. Gray*, 479 F.2d 20 (2nd Cir. 1973); *Williamson v. United States*, 31 A.F.T. R. 2d 800 (7th Cir. 1971)) holding that no notice was required, and the Fifth and Sixth Circuits (*Clark v. Campbell*, 501 F.2d 108 (5th Cir. 1974); *Rambo v. United States*, 492 F.2d 1060 (6th Cir. 1972)) holding that notice was

required. Thus, plaintiff cannot use *Laing* to premise his argument that the defendants violated "clearly established" constitutional rights as required in *Butz v. Economou*, *supra*, and *Wood v. Strickland*, *supra*, for at the time of the termination of the plaintiff's taxable year, the only appellate authority was in favor of the Internal Revenue Service's interpretation of Section 6851. See *Williamson v. United States*, *supra*. It was not until 1974, after the notice of deficiency was issued, that the Fifth Circuit held that such a notice was required. See *Clark v. Campbell*, *supra*.

Therefore, without again recounting the evidence and materials in the record, the court concludes that its careful examination of the evidence does not reveal any genuine issue as to defendant's reliance upon official

qualified immunity.[16] The plaintiff has failed to establish a genuine issue of material fact as to whether Baptist and Magill knew or reasonably should have known that they were violating plaintiff's constitutional rights, or that Baptist and Magill maliciously intended to harm the plaintiff by their actions. Defendants Baptist and Magill are thus protected from liability by the complete defense of qualified immunity.

The defendant Lee Willingham has also asserted the defense of official qualified immunity to protect him as a public officer from liability for any constitutional incursions. The plaintiff's claims against Willingham, as noted earlier, are:

a. That he conspired with other defendants

---

[16] For examples of the types of evidence which may tend to support a finding of malice, see *Barker v. Norman*, 651 F.2d 1107, 1126, nn. 21 and 22 (5th Cir. 1981).

and state officials to deprive plaintiff of his civil rights; and

b. That he levied on all property seized in the drug arrest by the Huntsville Police Department, seized plaintiff's father's automobile, plaintiff's guitar, currency collection and bank account. It is further alleged he seized said property before giving notice of termination, wrongfully converted plaintiff's guitar and failed to give information about the assessment or its amount and failed to examine evidence exculpating plaintiff of the I.R.S. charges of criminal activity and income therefrom.

The plaintiff has specifically alleged that subsequent to Willingham's seizure of the guitar and currency collection, defendant Willingham improperly released the seized guitar to another party and improperly disposed of the currency collection which carried an

alleged special value because of the unique nature of the collection.

With regard to all claims against Willingham except for the alleged improper release of the seized guitar and the improper disposal of the unique currency collection, summary judgment is granted on the basis of qualified immunity.[17] In July of 1972, defendant Willingham was a revenue officer in the Collection Division of the Birmingham District of the Internal Revenue Service. After the plaintiff's tax year was terminated, Willingham went to the jail where the plaintiff was in custody following his arrest and served the "Notice of Termination of Taxable Period" on plaintiff. He later seized the plaintiff's guitar and currency collection discussed above, and also the automobile which the plaintiff was

---

[17] See reasoning above as to defendants Baptist and Magill.

in when arrested. He later released the guitar to a Veronica Potter after she had shown him proof of ownership.[18] He admittedly failed to notify the plaintiff of his intention to deliver the guitar to Potter; nor did he discuss Potter's "proof" with plaintiff. Regarding the currency collection, the plaintiff seeks damages for its conversion. Subsequent to its seizure, the currency collection was treated as ordinary currency worth no more than its face value and was credited to the plaintiff's 1972 tax liability based upon its face amount.[19] Willingham asserts that he had no knowledge of the fact that the currency was part of a collection or that it had any special value. However,

---

[18] The value of the guitar was not credited to the plaintiff's alleged tax liability. Actual ownership of the guitar remains in dispute.

[19] Plaintiff has alleged that the currency in question carried a "special" value other than as cash at its face value.

the court's review of the record indicates that the issue of Willingham's notice as to the currency's special value may, at the very least, be a sufficient genuine issue of fact to enable this question and claim to survive a Motion for Summary Judgment.

Therefore, to the extent that the conversion type claims, based upon the seizure and subsequent disposal of the plaintiff's guitar and currency collection, are premised upon a deprivation of property without due proces (sic) of law, these claims are not dismissed and remain to be tried and are not defeated by the defense of qualified immunity. The qualified immunity defense protects Willingham from the claims that he conspired with other officials, that he wrongfully served the "Notice of Termination of Taxable Period" on the plaintiff, and that he wrongfully seized the aforementioned property, because Willingham has submitted

sufficient objective evidence, unrebutted by the plaintiff, to establish that he acted without malice or subjective intent and that he acted reasonably and in good faith within the scope of his discretionary authority. But, notwithstanding the partial applicability of the immunity defense, the alleged claims of deprivation without due process must stand.

DEFENSE OF ABSOLUTE IMMUNITY

In light of the cases cited above in the court's discussion of the defense of qualified immunity and in light of the court's conclusion as to the application of that defense to the parties in this action, the court will not address the defendant's assertion of absolute official immunity. There may be merit to these claims by Baptist and Magill.

STATUTE OF LIMITATIONS

The defendants have claimed entitlement

to dismissal on the ground that the cause of action is barred by a one-year statute of limitations. See Alabama Code § 6-2-39 (1975). The court has previously alluded to this issue with regard to defendant Frank McCammon who was dismissed as a defendant by order of this court entered December 4, 1981.[20] While this memorandum opinion and order dismissing Frank McCammon issued by this court did not mention the statute of limitations question, the court has determined since the entry of that order that any claim against McCammon by the plaintiff was clearly barred by the one-year limitations period. However, the court has reached this conclusion only with regard to defendant McCammon. In light of the court's finding that the defense of qualified official immunity completely protects defendants Baptist and

---

[20] See footnote 3 *supra*.

Magill from liability and partially protects defendant Willingham from liability, the court does not deem it necessary to address this issue further as to those claims dismissed against the three defendants. However, with regard to the conversion type claims against defendant Willingham alleging a denial of due process in the deprivation and disposal of the plaintiff's personal property, the court concludes that the six-year limitations period found in Alabama Code § 6-2-34 (1975) is applicable. In characterizing these claims for the purpose of selecting the appropriate statutory period, the court finds these claims to be most analogous to a common law action for conversion of personalty to which the six-year limitation period is proper.[21]

---

[21] Alabama Code § 6-2-34 (1975) provides in pertinent part that actions for the detention or conversion of personal property must be commenced within six years.

CONCLUSION

The court notes that the claims addressed in this memorandum opinion are only a few of many originally filed in this action. The court has carefully examined all submitted materials in a light most favorable to the plaintiff as to all claims against the named defendants. Nonetheless, the court has determined that the plaintiff has offered little more than his own subjective belief that the defendants in this action maliciously intended him harm. No sufficient objective facts in support of the plaintiff can be found in the record to raise a triable issue of fact as to whether or not the defendants were acting within the confines of their qualified good faith immunity from liability. While the plaintiff may harbor a sincere belief that the defendants maliciously intended to injure him

via the exercise of their power as officials with a powerful agency of our government, he has failed to "articulate any objective circumstances that could serve as a rational basis from which a fact-finder could infer that the defendant acted out of malice rather than duty." See *Barker v. Norman*, 651 F.2d 1107, at 1127 (1981). This court recognizes that judgmental mistakes may be made by men in the exercise of their discretionary authority and duty. However, the court is mindful of the following statement by the Supreme Court found in *Butz v. Economou*:

> "Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law."

Butz v. Economou, 438 U.S. 478, at 507 (1978). The Supreme Court also stated in *Butz*, that, "damages suits concerning constitutional violations need proceed to trial, but can be terminated on a properly support motion for

summary judgmeny (sic) based on the defense of immunity." 438 U.S. 478, at 508.

Therefore, defendants' Motion for Summary Judgment is due to be granted in full as to defendants Baptist and Magill, and is due to be granted in part as to defendant Willingham.

An order in accordance with this memorandum opinion will be entered contemporaneously herewith.

This the 8th day of January, 1982.

(s) ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE
ROBERT B. PROPST

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT, Plaintiff,	)	
v.	)	CIVIL ACTION NO.: CV77-PT-0951-NE
D.T. BAPTIST, District Director of Internal Revenue, et al., Defendants.	)	

ORDER

Plaintiff's Motion for Reconsideration of Order of January 8, 1982 Based on Newly Discovered Evidence and Mistake filed February 4, 1982 is DENIED.

DONE and ORDERED this 10th day of February, 1982.

(s) ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE
ROBERT B. PROPST

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.:
v.	)	CV77-PT-0951-NE
	)	
D.T. BAPTIST, District Director of Internal Revenue, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This cause comes on to be heard on Plaintiff's Motion for Reconsideration of Order of January 8, 1982 Based on Newly Discovered Evidence and Mistake filed February 4, 1982.

This court has previously entered memorandum opinions and contemporaneous orders granting summary judgment motions of defendants Baptist, Magill and McCammon who were dismissed as parties defendant.

As to defendant McCammon, the court primarily determined that there was no evidence of any constitutional deprivation.

As to defendants Baptist and Magill, the court primarily held that the actions against them were due to be dismissed because of their unrebutted claims of qualified immunity.

In view of these determinations, the court did not deem it necessary to specifically address the statute of limitations defenses as to these defendants. The court has determined that, in the event of an appeal of the final judgment in this case, all matters should be before the appellate court on the previous appeal.

The court discussed the statute of limitations defenses in a memorandum opinion entered August 4, 1981. The court hereby adopts the discussion in that memorandum opinion and supplements its memorandum opinions with regard

to Baptist, Magill and McCammon.

The court holds that there is no evidence of any continuing conspiracy directed toward plaintiff and that the acts complained of against Baptist, Magill and McCammon culminated more than one year prior to the filing of this action. If there was a wrongful termination, it was complete at the time the action was taken. If there was a constitutional violation in failing to give notice of the deficiency, this violation also culminated more than one year prior to the filing of this action. Thus, the court will deny plaintiff's motion.

The court further notes that the motion and attached affidavits were filed by plaintiff two days after a jury had been selected for the trial of the remaining issues in this case and on the date specifically set for trial after the case had been pending over four years.

This the 10th day of February, 1982.

(s) ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE
ROBERT B. PROPST

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT, Plaintiff,	)	
v.	)	CIVIL ACTION NO.: CV-77-PT-0951-NE
D.T. BAPTIST, District Director of Internal Revenue, et al., Defendants.	)	

JUDGMENT

This action came on for trial on February 4, 1982, before the Court and a jury, Honorable Robert B. Propst, United States District Judge, presiding, and the issues having been duly tried, and the jury having duly rendered its verdict, and this Court having previously entered its Order of January 8, 1982, granting the Motions for Summary Judgment of defendants Baptist and Magill, and having previously entered its Order of December 4, 1981, granting

the Motion for Summary Judgment of defendant McCammon, it is

ORDERED and ADJUDGED that plaintiff take nothing, that the action be dismissed with prejudice on the merits as to all defendants, and that all parties are to bear their own costs of action.

Dated at Birmingham, Alabama, this 17th day of March, 1982.

(s) ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE
ROBERT B. PROPST

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.:
v.	)	CV77-PT-0951-NE
	)	
LEE WILLINGHAM,	)	
	)	
Defendant.	)	

ORDER

This case is before the court upon plaintiff's Motion for Judgment Non Obstante Veredicto or, in the Alternative, Motion for New Trial, as supplemented. The court has previously considered all the matters raised and has reconsidered them on this motion.

For additional cases having a possible bearing on the case the court calls attention to *Myers v. United States*, 647 F.2d 591 (5th Cir. 1981); and *Nathan Rodgers Construction & Realty Corp. v. City of Saraland*, No. 80-7670 (5th Cir. 1982).

The Motion for Judgment Non Obstante Veredicto or in the Alternative, Motion for New Trial, as supplemented, is hereby DENIED.

DONE and ORDERED this 22nd day of March, 1982.

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CARL MICHAEL SEIBERT, Plaintiff-Appellant,	)	
v.	)	No. 82-7163
D.T. BAPTIST, District Director of Internal Revenue, et al., Defendants-Appellees.	)	

Appeal from the United States District Court
for the Northern District of Alabama

ORDER:

IT IS ORDERED that the motion of appellant to allow submission of appendix to the petition for rehearing and suggestion for en banc consideration is denied.

(s) PHYLLIS KRAVITCH
UNITED STATES CIRCUIT JUDGE
PHYLLIS KRAVITCH

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CARL MICHAEL SEIBERT,	)	
	)	
Plaintiff-Appellant,	)	
	)	NO. 82-7163
v.	)	D.C. Docket No.
	)	CA77-PT-0951-NE
D.T. BAPTIST, District Director of Internal Revenue, et al.,	)	
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the Northern District of Alabama

(May 27, 1983)

Before KRAVITCH and JOHNSON, Circuit Judges,

and LYNNE*, District Judge.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

"Costs taxed against plaintiff-appellant."

ISSUED AS MANDATE: Sept. 14, 1983

---

*Honorable Seybourn H. Lynne, U.S. District Judge for the Northern District of Alabama, sitting by designation.

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CARL MICHAEL SEIBERT, Plaintiff-Appellant,	)	
versus	)	No. 82-7163
D.T. BAPTIST, District Director of Internal Revenue, et al., Defendants-Appellees.	)	

Appeal from the United States District Court
for the Northern District of Alabama

(August 11, 1983)

ORDER:

IT IS ORDERED that the petition for rehearing and suggestion for en banc consideration is denied.

(s) PHYLLIS KRAVITCH
UNITED STATES CIRCUIT JUDGE
PHYLLIS KRAVITCH

APPENDIX M

CONSTITUTIONAL PROVISIONS

Article III, § 2 of the United States Constitution, provides in pertinent part, that:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, . . . (and) to all cases affecting . . . public ministers and consuls; . . . all cases . . . (in) controversies to which the United States shall be a party. . .
>
> In all the other cases before mentioned, the supreme court shall have appellate jurisdiction both as to law and fact, . . .

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides, in pertinent part, that:

> . . . the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment to the Constitution of the United States provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX N

STATUTES AND REGULATIONS INVOLVED

Section 6201 (Assessment authority) of Title 26 of the United States Code provides in pertinent part, that:

> (a) Authority of Secretary. — The Secretary is authorized and required to make inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

Section 6212 (Notice of deficiency) of Title 26 of the United States Code provides in pertinent part, that:

> (a) In general. — If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, 44, 45, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

Section 6213 (Restrictions applicable to deficiencies; petition to Tax Court) of Title

26 of the United States Code provides in pertinent part, that:

> (a) Time for filing petition and restriction on assessment. — Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851 or section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B, chapter 41, 42, 43, 44, or 45 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court until the decision of the Tax Court has become final. Notwithstanding the provisions of section7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

Section 6331 (Levy and distraint) of Title 26 of the United States Code provides in pertinent part, that:

(a) Authority of Secretary or delegate. — If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeoparty, notice and demand for immediate payment of such tax may be made by the Secretary or his delegeat and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property. — The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he

may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) Successive seizures. — Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary of his delegate may thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

Section 6851 (Termination of taxable year) of Title 26 of the United States Code provides in pertinent part, that:

(a) Income tax in jeopardy. —

(1) In general. — If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the proceeding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the

> taxpayer, together with a demand for immediate payment of the tax for the taxable period so delcared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy.

Section 6861 (Jeopardy assessments of income, estate, and gift taxes) of Title 26 of the United States Code provides in pertinent part, that:

> (a) Authority for making. — If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

(b) Deficiency letters. — If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment.

(c) Amount assessable before decision of Tax Court. — The jeopardy assessment may be made in respect of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of section 6212(c) prohibiting the determination of additional deficiencies, and whether or not the taxpayer has theretofore filed a petition with the Tax Court. The Secretary or his delegate may, at any time before the decision of the Tax Court is rendered, abate such assessment, or any unpaid protion thereof, to the extent that he believes the assessment to be excessive in amount. The Secretary or his delegate shall notify the Tax Court of the amount of such assessment, or abatement, if the petition is filed with the Tax Court before the making of the assessment or is subsequently filed, and the Tax Court shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith.

Section 7421 (Prohibition of suits to restrain assessment or collection) of Title 26 of the United States Code provides in pertinent

part, that:

> (a) Tax. — Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

APPENDIX O

Internal Revenue Manual Supplement (May 19, 1971) Termination of Taxable Periods Under Section 6851, provides in pertinent part, that:

Section 1. Purpose

This provides revised instructions and procedures for recommending, approving and effecting termination of taxable periods under IRC 6851, based on Policy Statement P-4580-3 (same as P-5210-2 and P-5(12)30-2.

Section 2. Background

.01 This office has become increasingly aware of the diverse practices of the field offices in handling cases involving termination of taxable years under section 6851. In many instances, *it appears that action is taken by a district office when it is advised by a local law enforcement agency of the existence of money or other property seized from a taxpayer after his arrest for State or Federal violations. Upon learning of the existence of such assets, the tax period is closed and an assessment in the amount of the available assets is made.* Thereafter, some offices have been handling the assessment under *section 6861* of the Internal Revenue Code relating to jeopardy assessments, and other offices have been handling the assessment under section 6201 of the Code. (emphasis added)

.02 Departing alien procedures are already provided in IRM 4299 and IRM 5(15) 6(11).

Section 3. Requirements

.01 *Termination of taxable year and assessment must be used sparingly and care taken to avoid excessive and unreasonable assessments.* They should be limited to amounts which reasonably can be expected to equal the ultimate tax liability for the terminated period. Therefore, *a termination of taxable year and assessment must be personally approved by the District Director* or the Director of International Operations. If none of the following conditions exist, then prior approval must be secured from the Director, Audit Division (CP:A:P): (emphasis added)

1. The taxpayer is or appears to be designing quickly to depart from the United States or to conceal himself.

2. The taxpayer is or appears to be designing quickly to place his property beyond the reach of the Government either by removing it from the United States, or by concealing it, or by transferring it to other persons, or by dissipating it.

3. The taxpayer's financial solvency is or appears to be imperiled. (This does not include cases where the taxpayer becomes insolvent by virtue of the accrual of the proposed assessment of tax, penalty or interest.)

Section 4. Assessment Procedures at Termination

.01 The determined tax resulting from the IRC 6851 termination is assessed under IRC 6201 and levy action taken under IRC

6331(a) after notice and demand and where appropriate without regard to the 10-day period. No statutory notice of deficiency will be issued for the short period.

Section 6. Procedures After Termination

.06 These cases will be subject to the same post review procedures as Jeopardy Assessment cases, IRM 4875.

Internal Revenue Manual:(Document MT 4500-129 (9-15-71)): paragraph 4584.3, Potential Criminal Cases, provides that:

> Jeopardy assessments will be withheld in potential criminal tax cases to the extent necessary to avoid imperiling successful investigation or prosecution of such cases. On the other hand, when such action is warranted in those cases, it must be taken whenever it is feasible to do so. The District Director is responsible for this practice when jeopardy assessment recommendations are submitted to him for approval.

Internal Revenue Manual: (Document MT 4500-129 (9-15-71)): paragraph 4584.4, Responsibility for Recommending Jeopardy Assessments, provides that:

> (1) Audit Division is responsible for all recommendations for jeopardy assessments in cases under active consideration

in Audit. Questions arising may be referred to the National Office, Attention: CP:A:P.

(2) Intelligence Division is responsible for all recommendations for jeopardy assessments in any case under active consideration by Intelligence and for jeopardy assessments in cases under joint active consideration by Intelligence and Audit.

(3) Collection Division is responsible for recommendations for jeopardy assessments in any case in which collection of the tax would be jeopardized by delay, except those cases under active consideration by Audit or Intelligence. If Collection receives or develops information on cases under active consideration by Audit or Intelligence indicating that collections will be jeopardized by delay, the Chief, Collection Division, furnishes a report thereof to the appropriate division.

(4) If, during Appellate Division consideration of a case, it is determined that a jeopardy assessment may be advisable, a memorandum setting forth the facts in the case is forwarded to Audit. In these cases the responsibility for recommending jeopardy assessments lies with Audit. (See IRM 4584.9)

(5) Although the basic responsibility for recommending jeopardy assessments will be as provided herein, this does not preclude any other division from submitting pertinent information regarding the matter to the responsible division for consideration.

Internal Revenue Manual: (Document MT 4500-129 (9-15-71)): paragraph 4584.5, Prima Facie Jeopardy Cases, provides that:

> (1) Certain conditions and circumstances can properly be considered as establishing prima facie cases in which jeopardy assessments should be made. Examining officers investigating taxpayers of the types in (2) below will prepare separate reports, (except in joint investigation cases), containing specific recommendations for or against jeopardy assessments setting forth the facts and circumstances upon which such recommendations are based. If a jeopardy assessment is deemed warranted prior to completion of the report of investigation, the facts and circumstances relative to jeopardy will be covered in a separate report in sufficient detail so that designated officers in Audit Division can make a decision on the merits of the recommendation.
>
> (2) The types of cases are as follows:
>
> (a) Cases involving well-known, major operators in the criminal fiels, irrespective of present financial condition. This is due to the fact that these individuals by the very nature of their business activity are in such position that their financial condition could change at any time without warning.
>
> (b) Individuals generally known to frequently wager large amounts. In these cases the loss of a single bet might reduce the taxpayer to insolvency; this is especially true if his assets consist largely of cash.

(c) Individuals engaged in taking wagers, irrespective of whether major, secondary or minor operators. Although taxes in these cases might not be in jeopardy to the same extent as in cases under (b), nevertheless, a series of losses could absorb all of the taxpayer's assets.

(d) Individuals engaged in other activities generally regarded as illegal where there are possibilities of large unexpected losses or interference with their business or activity by others of the criminal element such as hijackers, blackmailers, etc.

(e) Individuals with a background and history of activity in illegal enterprises such as gambling, bootlegging, narcotics, etc., who are presently engaged in so-called legitimate business ventures. Such individuals must be considered a poor risk by the very nature of their activities and probable associations with the racketeer elements.

(f) Taxpayers engaged in legitimate business but who are consistently suffering business or personal losses.

(g) Taxpayers against whom large damage suits are pending or against whom such suits are threatened.

(h) Taxpayers who have a past record for resisting or avoiding payment of their taxes.

(i) Taxpayers known or suspected of having plans for leaving the United States without making provision for payment of their taxes, with particular attention being given to aliens generally considered as border hoppers.

(j) Other taxpayers where the facts and circumstances indicate that the taxpayer's present financial condition or future possibilities are such as to make collection of the tax doubtful.

Internal Revenue Manual: (Document MT 4500-129 (9-15-71)) paragraph 4584.6, Examiners' Reports, provides in pertinent part, that:

(1) Evidence indicating jeopardy and information regarding the taxpayer's financial condition should be developed to the maximum extent so that all possible information which should be considered in determining whether a jeopardy assessment is proper will be available to the Chief, Audit Division, for consideration in connection with his technical review of the case before referral to the District Director for approval.

Internal Revenue Manual: (Document MT 4500-129 (9-15-71)) paragraph 4584.7, Recommendation Procedure for Jeopardy and Quick Assessments, provides that:

(1) When it is determined that collection will be jeopardized by delay if regular assessment and collection procedures are followed, a recommendation for jeopardy assessment will be made by the responsible division as provided in IRM 4584.4. Form

2644 (Recommendation for Jeopardy Assessment Recommendation for Termination Assessment) is provided for this purpose. A separate Form 2644 in triplicate will be prepared for each taxpayer in cases involving transferor-transferee liability or assessment of 100 percent penalty as provided in IRC 6672. In addition, Form 2645 (List of Property Belonging to Taxpayer) should be prepared to the extent practicable, setting forth the property of the taxpayer.

(2) Upon completion by the responsible division, the complete file relating to the proposed jeopardy assessment shall be referred for concurrence or comment to the Chief, Colelction Division, and then to the Chief, Audit Division, and finally to the District Director, for approval. The review by Colelction will ensure that the most qualified people will determine whether collection of the tax is in jeopardy. Because of the urgency usually involved in jeopardy assessment cases, the file will be given the highest priority of handling within and between the various divisions.

(3) If a recommendation for a jeopardy assessment is received from another organizational unit of the Service, the Treasury Department or Justice Department, the recommendation will be transmitted to the Chief, Audit Division, who will ascertain the status of the case. If the information shown on the recommendation is too general and vague to support a jeopardy assessment, the recommendation will be assigned to a revenue agent or special agent, as

the case may be, to develop as expeditiously as possible the facts necessary for approval or disapproval. Any such oral recommendation received must be confirmed in writing prior to referral to the District Director for his approval or disapproval.

(4) If the recommendation is approved, either by the District Director, or Director, Audit Division, National Office, the file will be transmitted to the service center, Accounting and Research Division, for jeopardy assessment. After assessment has been accomplished, the service center returns the file with the two copies of Form 2644 to Review Staff for further administrative action. The original Forms 2644 and 2645 are retained by the service center.

(5) Quick assessments may be requested using Form 2859 (Request for Quick or Prompt Assessment). Form 2859 is usually prepared in quadruplicate. Original and one copy are sent to the service center, one copy is retained by preparer, and in bankruptcy cases one copy is sent to Special Procedures Staff in Collection Division. (See IRM 4583.2)

(6) Telephone requests for jeopardy or quick assessments may be made to the service center when warranted. (See ADP Handbook 342-738.03 6 for service center procedure.) Such telephone requests must be followed promptly with properly approved Forms 2644 or 2859, as appropriate. When a jeopardy or quick assessment is requested by telephone, the following information

must be furnished:

(a) Affirmative statement in jeopardy case that District Director has approved Form 2644.

(b) Name, address, and EIN or SSN of taxpayer.

(c) Type of tax.

(d) Taxable period.

(e) Amount of tax, penalty, and interest to be assessed.

(f) Amount of payment, if any, and balance due.

Internal Revenue Manual: (Document MT 4500-129 (9-15-71)) paragraph 4584.8, Immediate Review and Issuance of 90-Day Letters, provides in pertinent part, that:

> (1) Immediately after assessment, all jeopardy assessment cases will be forwarded to the office of the Assistant Regional Commissioner (Audit) for review. Regional review of these cases will be given highest priority and the cases will be returned promptly to the district offices for further administrative action. *It should be borne in mind that in such cases any necessary statutory notices not previously issued must be issued within 60 days from the date of assessment.* (emphasis added)
>
> (2) Jeopardy assments made by the Office of International Operations will be immediately reviewed by the National Office Audit Division, (CP:A:P).

Internal Revenue Manual: (Document MT

4500-129 (9-15-71)): paragraph 4585, Termination of Taxable Period under IRC 6851, provides in pertinent part, that:

¶ 4585.1 Statutory Basis

(1) IRC 6851 specifically applies when the taxable year of a taxpayer has not ended, and also when the taxable year has ended but the due date for filing the return has not arrived.

(2) Assessments under IRC 6851 are not in a technical sense jeopardy assessments. *Nevertheless, the review procedures in IRM 4584.8 relating to jeopardy assessments apply also to assessments under IRC 6851,* except with respect to departing aliens (see IRM 4299). (emphasis added)

(3) IRC 6658 provides that in addition to all other penalties, a penalty of 25 per centum of the total amount of the tax or deficiency in tax may be added as a part of the tax for violations or attempts to violate the provisions of IRC 6851.

¶ 4585.2 Procedures for Terminating Taxable Period

(1) *Termination of taxable year and assessment must be used sparingly and care taken to avoid excessive and unreasonable assessments. They should be limited to amounts which reasonably can be expected to equal the ultimate tax liability for the terminated period. Therefore a termination of taxable year and assessment must be personally approved by the*

District Director or the Director of International Operations. Prior approval must be secured from the Director, Audit Division (CP:A:P), if none of the following conditions exist: (emphasis added)

(a) The taxpayer is or appears to be designing quickly to depart from the United States or to conceal himself.

(b) The taxpayer is or appears to be designing quickly to place his property beyond the reach of the Government either by removing it from the United States, or by concealing it, or by transferring it to other persons, or by dissipating it.

(c) The taxpayer's financial solvency is or appears to be imperiled. (This does not include cases where the taxpayer becomes insolvent by virtue of the accrual of the proposed assessment of tax, penalty and interest.)

(2) It is recognized that due to the many conditions and factors having a bearing upon recommendations for termination of taxable year and assessments no specific rules can be established for preparing reports in support thereof in every case. However, the following information should be submitted in all cases to the extent practicable:

(a) Name and address of taxpayer.

(b) Tax and penalty to be assessed by periods.

(c) The nature of the taxpayer's business or activity.

(d) The taxpayer's present financial condition.

(e) Information regarding the taxpayer's activity giving rise to the recommendation, such as transfer of assets

without consideration.

(f) Record with respect to continuing business or personal losses.

(g) Filing record of taxpayer.

(h) The taxpayer's record for resisting payment of taxes in the past. (Collection delays and unpaid taxes.)

(i) The nature and location of the taxpayer's assets and the source of his income.

(j) Any other information having a bearing upon the taxpayer's financial condition, future prospects for losses, etc.

(3) *An assessment made as a result of termination of taxable period must be based on a reasonable computation of tax liability. An assessment equal to the amount of money or other valuable property held by a person at the time of arrest is not considered a reasonable computation unless supported by other facts.* (emphasis added)

(4) A recommendation that the 25% penalty provided by IRC 6658 be added to the tax must be based on the fact that the taxpayer performed, or attempted to perform an act or acts tending to prejudice or to render wholly or partially ineffectual proceedings to collect income tax made due and payable by virtue of IRC 6851. (See Rev. Rul. 68-96, C.B. 1968-1. 566.)

(5) The basis on which the adjusted gross income was computed will be stated. This will be an acceptable legal basis (for example, a source and application of funds statement or net worth computation). All known assets, liabilities, income and

expenses will be considered. A reasonable estimate will be made of expenses, if appropriate, as for example in connection with a net worth computation. Also:

(a) Cost of living expenses whould include professional estimates by a narcotics agent (or other expert) as to the "Cost of Habit" for a narcotics addict.

(b) Estimates of income from the sale of narcotics should be supported, if possible, by testimony from a narcotics agent (or other expert) who may have knowledge of the subject's activities.

(c) Estimates of income from illegal gambling, including "gross take" and "payoffs" may be support by testimony of law enforcement officers who are familiar with the gambler's operations. Efforts should be made to obtain similar testimony in cases involving other illegal activities.

(d) The taxpayer should be interviewed, if feasible, preferably before assessment is made, in order to afford him an opportunity to explain questioned assets, liabilities, income or expenses, filing history, etc. Such an interview may also be of value in revealing previously unknown assets, liabilities, income or expenses.

(e) Efforts should be made to locate and examine books and records, if any, of the taxpayer to the extent possible in the available time.

¶ 4585.3 Assessment procedures at Termination of Taxable Period

(1) The determined tax resulting from the IRC 6851 termination is assessed under

IRC 6201 and levy action taken under IRC 6331(a) after notice and demand and if appropriate without regard to the *10 day period*. No statutory notice of deficiency will be issued for the short period. (emphasis added)

(2) "Substitute for return" procedures in IRM 4562.4 will be followed. These are not applicable to issuance of statutory notices.

(3) Notice of Termination of Taxable Period (Pattern Letter P-49) (Exhibit 4580-1) is prepared in triplicate and dated as of date presented or mailed to the taxpayer. It is usually prepared in Audit Division. Review Staff, at the time Form 2644 (Recommendation for Jeopardy Assessment/Recommendation for Termination Assessment) is approved and sent to Collection Division for demand and immediate payment of the tax for the taxable year terminated and demand for immediate payment of any tax for the preceding year as remains unpaid. To avoid delays, it may be necessary to request preparation and approval of Form 2644 by telephone. Notice of Termination of Taxable Period should be delivered personally to the taxpayer. The taxpayer should be advised that IRC 443 requires that he file a return for the terminated taxable period. If the taxpayer cannot be located or personal service cannot be accomplished within the time limitations imposed by the circumstances, the notice may be sent be certified mail, return receipt requested, addressed to the taxpayer's last known addressed. The tax for the terminated period will then be

promptly assessed and will be followed by a notice and demand.

APPENDIX P

Section 1331 (Federal question; amount in controversy; costs) of Title 28 of the United States Code provides in pertinent part, that:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

Section 2201 (Creation of remedy) of Title 28 of the United States Code provides that:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 (26 USCS § 7428), any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal regulations of any interested party seeking such declaration, shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Section 2202 (Further relief) of Title 28 of the United States Code provides that:

Further necessary or proper relief based on a delcaratory judgment or decree may be granted after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

APPENDIX Q

Section 1983 (Civil action for deprivation of rights) of Title 42 of the United States Code provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and alws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1985 of Title 42 of the United States Code provides in pertinent part, that:

> (3) Depriving persons of rights or privilages. (sic) If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all person within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen

> who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, thereby another is injured in his person or property, or deprived of having and exercising any irght or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Section 1986 (Same; action for neglect to prevent) of Title 42 of the United States Code provides that:

> Every person who, having knowledge that any of the wrongs, conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages

may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for teh benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

APPENDIX R

The Federal Rules of Civil Procedure, Rule 26, General Provisions Governing Discovery, provides in pertinent part, that:

> (a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.
>
> (b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim of defense of any other party, including the existence description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making

it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

The Federal Rules of Civil Procedure, Rule 33, Interrogatories to Parties, provides that:

> (a) Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.
>
> Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or

other failure to answer an interrogatory.

(b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquiried into under Rule 26(b), and the answers may be used to the extend permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involved an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation. abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the

records from which the answer may be ascertained.
(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980.

The Federal Rules of Civil Procedure, Rule 34, Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes, provides in pertinent part, that:

> (a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procdure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the reques may move for an order under Rule 37(a) with respect to any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

The Federal Rules of Civil Procedure, Rule 56, Summary Judgment, provides in pertinent part, that:

> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.
>
> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declatory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought hsall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgmetn, interlocutory in character, may be rendered on the issue of liability alone although

there is a genuine issue as to the amount of damages.